

The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

EDWARD JOHN KOWAL,

Plaintiff,

vs.

ZVUE CORPORATION, a Delaware
Corporation, JEFF OSCODAR, BILL
BUSH, and CARL PAGE;

Defendants.

CASE NO. C08-108RSL

AMENDED COMPLAINT FOR
DECLARATORY RELIEF AND BREACH
OF CONTRACT

COMES NOW Edward John Kowal, and by way of Complaint against ZVUE Corporation, Jeff Oscodar, Bill Bush, and Carl Page alleges as follows:

I. JURISDICTION AND VENUE

1. Edward John Kowal ("Kowal") is a resident of King County, Washington and has been a resident of King County, Washington at all times material to the events alleged in this complaint.

2. ZVUE Corporation ("ZVUE") is a Delaware corporation doing business in the state of Washington both on its own behalf and through various

1 wholly-owned subsidiaries. ZVUE was formerly known as "Handheld
2 Entertainment, Inc."

3 3. Jeff Oscodar ("Oscodar") is Director, Chief Executive Officer &
4 President of ZVUE.

5 4. Bill Bush ("Bush") was the Chief Financial Officer at the time of the
6 events underlying this complaint and currently serves as a strategic advisor to
7 ZVUE.
8

9 5. Carl Page ("Page") is the Chief Technology Officer of ZVUE.

10 6. Oscodar, Bush, and Page were officers of the ZVUE Corporation at
11 the time of the events underlying this complaint and were all individually
12 involved in making the decisions and taking the actions on behalf of ZVUE that
13 form the basis of this complaint.
14

15 7. John Kowal's performance under the contract at issue in this matter
16 has occurred largely in King County, Washington and most of the events at issue
17 in this matter involve events occurring primarily in King County, Washington.
18

19 8. Jurisdiction and venue are appropriate in this Court.

20 II. BACKGROUND FACTS

21 9. In the calendar year 2006 John Kowal owned and managed Dorks,
22 LLC. That business involves the creation and operation of a website in which
23 video clips and other media are available to Internet users to view and/or
24
25

1 download. Business revenue was created through the sale of advertising space on
2 the website targeted at the website demographic.

3 10. In 2006 HandHeld Entertainment, Inc. (hereafter "HandHeld")
4 purchased Dorks, LLC. In connection with that purchase, HandHeld and Kowal
5 entered into an Employment Agreement.

6 11. The Employment Agreement between HandHeld and Kowal
7 contained various provisions, including those described below.

8 12. In the first numbered paragraph, with the heading "Duties and
9 Position," the Employment Agreement states that the employee (John Kowal)
10 would have duties including "the identification and facilitation of the acquisition
11 of businesses similar to [Dorks, LLC.]" That provision goes on to state as follows:
12

13
14 As part of Employee's employment with the Company,
15 Employee shall, without limitation, assist the Company
16 with identifying and closing acquisitions of other
17 websites, work with the Company's web development
18 team to optimize the Company's existing website (as
19 well as any additional websites that the Company may
20 acquire in the future), and assist the Company with
21 determining and implementing a strategy for the
22 syndication of all of the other websites and content that
23 the Company may acquire in the future.

24 13. The Employment Agreement also provides for compensation to John
25 Kowal. The Employment Agreement, in ¶3.1, provides him with a salary of
\$20,000 per year. In paragraph 3.2 the Employment Agreement provides for
certain bonuses. The agreement states as follows:

Bonuses. Employee shall be eligible for bonuses in the form of stock for assisting in the acquisition of other websites, as set forth on the attached Schedule A. The Company and Employee understand and agree that the principal goal of Employee's services shall be to expand the business of Dorks, LLC via acquisitions of similar businesses, and that both the Company and Employee agree that the compensation of Employee is therefore primarily based upon how successful he will be in fulfilling that goal.

14. The Employment Agreement contains a Schedule A which sets forth the method of determining bonuses. The bonus to be paid to Mr. Kowal vary from 3 to 5%, depending on the "transaction value" in the acquisition. "Transaction value" is specifically defined as "the aggregate value of the specific Transaction." Schedule A, note 3. Bonuses are paid in newly issued restricted shares of HandHeld. Schedule A sets forth the manner in which the price of the bonus share is determined. Schedule A, note 5.

15. In the twelve months following the signing of the Employment Agreement, plaintiff John Kowal was involved in the identification and facilitation of the acquisition of businesses similar to Dorks, LLC. In each of those acquisitions, Mr. Kowal was paid a bonus in accordance with Schedule A. In each acquisition the amount of the bonus was determined by the "aggregate value of the specific Transaction."

16. The Employment Agreement provides for an award of attorney fees and disbursement in favor of Mr. Kowal if an action to enforce the Agreement results in a judgment in his favor. Employment Agreement, ¶11.2.

III. SPECIFIC FACTS RELATED TO THE DISPUTE

17. John Kowal identified and facilitated the acquisition by HandHeld of eBaum's World, Inc. In an Asset Purchase Agreement dated August 1, 2007, HandHeld, through its wholly owned subsidiary EBW Acquisition, Inc., purchased eBaum's World, Inc. for a total purchase price of "up to \$52,500,000.00." HandHeld/eBaum Asset Purchase Agreement, ¶1.08.

18. Under the terms of the Asset Purchase Agreement, HandHeld (now ZVUE) became immediately obligated to pay \$20,000,000 in guaranteed payouts. In addition, HandHeld was required to up to another \$32,500,000 in payouts depending on specified future events as set forth in the Asset Purchase Agreement.

19. HandHeld has, at times, agreed that John Kowal is due a commission under his Employment Agreement for the eBaum's World, Inc. transaction. However, HandHeld (now ZVUE) has taken the position that the total bonus payable to John Kowal shall be measured on a purchase price value of \$17.5 million, rather than the actual amount paid. Further, Handheld has refused to pay any bonus to Mr. Kowal.

20. John Kowal disagrees with the position taken by HandHeld that he is only entitled to a commission on the \$17.5 million figure. Rather, Mr. Kowal contends that the Employment Agreement requires that HandHeld pay him a commission on the "aggregate value of the specific transaction." This means that

1 whenever additional purchase price funds are paid by HandHeld (now ZVUE) on
2 the eBaum's World transaction, John Kowal will be entitled to a commission on
3 those payments as set forth in Schedule A to his Employment Agreement.
4 HandHeld, to date, has rejected this position and has refused to recognize any
5 additional right to Mr. Kowal following the initial commission payment to Mr.
6 Kowal.
7

8 21. The parties have an on-going and actual dispute which they have
9 attempted, without success, to resolve.

10 IV. CAUSES OF ACTION

11 22. Declaratory relief. Pursuant to RCW Chapter 7.24, John Kowal seeks
12 a declaratory judgment with respect to the respective rights and obligations of the
13 parties to this matter.
14

15 23. Specifically, John Kowal seeks a declaration that he is entitled to a
16 commission under Schedule A of the Employment Agreement, and the related
17 bonus provisions in that contract calculated based upon the "aggregate value" of
18 the eBaum's World, Inc. acquisition by HandHeld. John Kowal is entitled to
19 bonus payments on any amounts paid pursuant to ¶1.08 (Purchase Price) of the
20 Asset Purchase Agreement by and among HandHeld, EBW Acquisition, Inc. and
21 eBaum's World, Inc. Those payments shall include, as set forth in ¶1.08,
22 payments made under ¶1.09 of the Asset Purchase Agreement among HandHeld,
23 EBW Acquisition, Inc. and eBaum's World, Inc.
24
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1 24. The parties have a current and on-going dispute as to the matters set
2 forth above and require interpretation from the Court in order to terminate the
3 uncertainty and disagreement between the parties regarding this dispute.

4 V. BREACH OF CONTRACT

5 25. The allegations set forth above are hereby incorporated by reference
6 and restated as part of the Breach of Contract claim.

7 26. The actions taken by HandHeld (now ZVUE) to restrict the
8 commission payable to John Kowal in this matter constitute a present and
9 anticipatory breach of the bonus provisions in the Employment Agreement
10 between John Kowal and HandHeld.
11

12 27. John Kowal has been damaged by that breach in an amount to be
13 proven at trial, but that amount includes, and is not limited to, damages of the 5%
14 commission payable to seller under ¶¶1.08 and 1.09 of the Asset Purchase
15 Agreement among HandHeld, EBW Acquisition, Inc. and eBaum's World, Inc.,
16 plus interest.
17

18 WHEREFORE, having fully stated a claim for declaratory relief, breach of
19 contract and injunctive relief, John Kowal prays for the following relief:
20

21 1. A declaration that John Kowal is entitled under the terms of his
22 Employment Agreement with HandHeld, to a 5% commission calculated based
23 upon the "aggregate value" of the eBaum's World, Inc. transaction including all
24
25

1 payments made pursuant to ¶¶1.08 and 1.09 of the Asset Purchase Agreement
2 among HandHeld, EBW Acquisitions, Inc. and eBaum's World, Inc.;

3 2. A declaration that HandHeld (now ZVUE) is in material breach of
4 the Employment Agreement;

5 3. Damages in an amount to be proven at trial, including but not
6 limited to a commission of 5% of the total "aggregate value" paid to the Seller as
7 required by the Asset Purchase Agreement among HandHeld, EBW Acquisition,
8 Inc. and eBaum's World, Inc.;

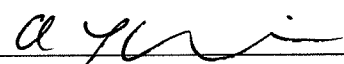
10 4. Damages against all defendants under RCW 49.52.070 for an amount
11 up to twice the amount unlawfully withheld by defendants;

12 5. An award of attorney fees and disbursements pursuant to ¶11.2 of
13 the Employment Agreement and RCW 49.52.070; and

15 6. Such further relief as the Court deems just and equitable.

16 Dated this 31st day of July, 2008.

17 HELSELL FETTERMAN LLP

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19
20 By 
21 Andrew J. Kinstler, WSBA #12703
22 Attorneys for Plaintiff Edward John
23 Kowal
24
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